

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

**AZTEC MUNICIPAL SCHOOLS
BOARD OF EDUCATION,**

Plaintiff,

vs.

No. CIV 08-0183 MV/WDS

**HENRY KING, DORA KING,
and DOUG MOELLER**

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on the following motions: (1) Defendants' Memorandum of Notice and Motion for Vacation of Clerk's Entry of Default [**Doc. No. 24**], filed on August 4, 2008; (2) Defendants' Motion for Summary Judgment [**Doc. No. 28**], filed September 18, 2008; (3) Plaintiff's Motion for Default Judgment [**Doc. No. 31**], filed on October 9, 2008; and (4) Motion for Summary Judgment [**Doc. No. 37**], filed on December 22, 2008.

Defendants move the Court to vacate the Clerk's Entry of Default entered on July 25, 2008. As grounds for their motion, Defendants contend they mistakenly filed their Answer on March 26, 2008, in *King v. Aztec Municipal Public Schools*, No. CIV-08-0249 RB/WJS. A review of the docket report in that case supports Defendants' mistake. *See* Docket No. 3 in No. CIV-08-0249 RB/WJS. In fact, Defendants also mistakenly filed a motion for summary judgment and an amended motion for summary judgment in *King v. Aztec Municipal Public Schools*, No. CIV-08-0249 RB/WJS, when they should have filed those motions in this case. *See*

Docket No. 17 in No. CIV-08-0249 RB/WJS (Letter from Judge Brack directing Mr. Moeller to withdraw those motions and refile them in No. CIV-08-0183 MV/WDS).

Plaintiff filed its Motion for Default Judgment on May 9, 2008. On May 23, 2008, the Court denied the motion without prejudice because it was procedurally defective. *See* Docket No. 13. The Court directed Plaintiff to follow the procedure set forth in Rule 55 of the Federal Rules of Civil Procedure and the district's local rules. Thereafter, Plaintiff followed the proper procedure. On July 25, 2008, the clerk entered default as to each Defendant. *See* Docket Nos. 21-23. On August 4, 2008, Defendant Moeller entered his appearance for all Defendants and filed the present motion. On September 19, 2008, Defendants filed their Answer. Defendants move the Court to vacate the Clerk's Entry of Default and impliedly to extend the time to file their Answer.

Under FED.R.CIV.P. 6(b)(2), the Court has discretion to permit the late filing of Defendants' Answer if Defendants can show that the delay was caused by "excusable neglect." *Panis v. Mission Hills Bank, N.A.*, 60 F.3d 1486, 1494 (10th Cir. 1995). Excusable neglect may encompass delays caused by inadvertence, by mistake, or by carelessness. *Id.* In this case, the record demonstrates Defendants's late filing was due to mistake and not bad faith on Defendants' part. In light of the strong preference for disposition of litigation on the merits, *see Gomes v. Williams*, 420 F.2d 1364, 1366 (10th Cir. 1970), the Court will permit Defendants' late filing of their Answer and deny Plaintiff's Motion for Default Judgment as moot.

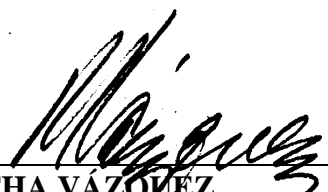
On September 18, 2008, Defendants filed a Motion for Summary Judgment (Doc. No. 28). On December 22, 2008, Defendants filed the same Motion for Summary Judgment (Doc. No. 37) that they filed on September 18th. Moreover, Defendants' counsel failed to comply with

Local Rule 56. Defendants did not “set out a concise statement of all of the material facts as to which movant[s] contend no genuine issue exists.” *See* D.N.M.LR-Civ.56.1(b). Because Defendants failed to demonstrate that they are entitled to judgment as a matter of law, the Court will deny their motions for summary judgment.

IT IS THEREFORE ORDERED that Defendants’ Memorandum of Notice and Motion for Vacation of Clerk’s Entry of Default, filed on August 4, 2008 [Doc. No. 24], is hereby **GRANTED**.

IT IS FURTHER ORDERED that Defendants’ Motion for Summary Judgment, filed on September 18, 2008 [Doc. No. 28], Defendants’ Motion for Summary Judgment, filed on December 22, 2008 [Doc. No. 37] and Plaintiff’s Motion for Default Judgment, filed on October 9, 2008 [Doc. No. 31] are **DENIED**.

DATED this 27th day of February, 2009.



MARTHA VÁZQUEZ
Chief United States District Court Judge

Attorney for Plaintiff:
Jacquelyn Archuleta-Staehlin

Attorney for Defendants:
F.D. Moeller